Supreme Court, U.S.
FILED
MAR 4 1999
CLERK

No. 98-830

In The

Supreme Court of the United States

October Term, 1998

AMOCO PRODUCTION COMPANY,
on behalf of itself and the class it represents,

Petitioners,

v.

SOUTHERN UTE INDIAN TRIBE,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

AMICI CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION, WYOMING FARM BUREAU FEDERATION, MONTANA FARM BUREAU FEDERATION, UTAH FARM BUREAU FEDERATION, AND NEW MEXICO FARM & LIVESTOCK BUREAU IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

IDENTITY AND INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE PLAIN MEANING OF THE WORD "COAL" PROVES THAT CONGRESS RESERVED ONLY THE SOLID ROCK "COAL" 4

II. THE TENTH CIRCUIT'S "SCIENTIFIC" ANALYSIS CREATED AN UNWORKABLE SPLIT NATURAL GAS ESTATE 6

III. THE TENTH CIRCUIT IGNORED WELL-ESTABLISHED PRINCIPLES REGARDING THE OWNERSHIP OF, AND THE RIGHT TO EXTRACT, MINERALS 9

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Brown v. Spilman, 155 U.S. 665 (1895) 8

Chartiers Block Coal Co. v. Mellon, 25 A. 597 (Pa. 1893) 11

Del Monte Mining & Milling Co. v. Last Chance Mining and Milling Co., 171 U.S. 55 (1898) 11

Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982) 4

Guffey v. Stroud, 16 S.W.2d 527 (Tex. Comm'n App. 1929) 9

Isbrandtsen Co. v. Johnson, 343 U.S. 779 (1952) 12

Kinney-Coastal Oil Company v. Kieffer, 277 U.S. 488 (1928) 12

Leo Sheep Co. v. United States, 440 U.S. 668 (1979) 4

Moskal v. United States, 498 U.S. 103 (1990) 5

Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900) 8

Perrin v. United States, 444 U.S. 37 (1979) 6

Russello v. United States, 464 U.S. 16 (1983) 5

Southern Ute Indian Tribe v. Amoco Production Co., 874 F.Supp. 1142 (D. Colo. 1995) 5

Southern Ute Indian Tribe v. Amoco Production Co., 151 F.3d 1251 (10th Cir. 1998) ..... *passim*

United States v. Denver & Rio Grande Ry. Co., 150 U.S. 1 (1893) 4

United States v. Labonte, 117 S.Ct. 1673 (1997) 4

TABLE OF AUTHORITIES – Continued

Page

United States v. Smith, 508 U.S. 223 (1993) 6

United States v. Texas, 507 U.S. 529 (1993) 11

STATUTES

Coal Lands Act of 1909, 30 U.S.C. § 81 ..... *passim*

Coal Lands Act of 1910, 30 U.S.C. §§ 83-85 ..... *passim*

Uraniferous Lignite Act, 30 U.S.C. §§ 541-541i 9

LEGISLATIVE HISTORY

H.R. Rep. No. 1478, 84th Cong., 1st Sess. 4 (1955), *reprinted in*, 1955 U.S.C.C.A.N 2992, 2996 9

ADMINISTRATIVE DECISIONS

Ownership of and Right to Extract Coalbed Gas in Federal Coal Deposits (M-36935), 88 Interior Dec. 538 (1981) 2

OTHER AUTHORITIES

6 *American Law of Mining* (2d ed. 1997) 11

Craig and Myers, *Ownership of Methane Gas in Coalbeds*, 24 Rocky Mtn. Min. L. Inst. 767 (1978) 10

2 *Lindley on Mines* (2d ed. 1903) 11, 12

Popiel, *Introduction to Colloid Science* (1978) 7

TABLE OF AUTHORITIES – Continued

Page

Rice, Law, and Clayton, *Coalbed Gas – An Undeveloped Resource, in The Future of Energy Gases*, 389 (U.S.G.S. Prof. Paper 1570, David G. Howell ed. 1993) 8

6 *Thompson on Real Property* (David A. Thomas ed. 1994) 11

United States Bureau of Mines, Information Circular No. 7670, *Drainage and Utilization of Firedamp*, 1 (1953) 10

SUPREME COURT RULES

Supreme Court Rule 37(3)(a) 1

Supreme Court Rule 37(6) 1

AMICI CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION, WYOMING FARM BUREAU FEDERATION, MONTANA FARM BUREAU FEDERATION, UTAH FARM BUREAU FEDERATION, AND NEW MEXICO FARM & LIVESTOCK BUREAU IN SUPPORT OF PETITIONERS

Mountain States Legal Foundation respectfully submits this *amici curiae* brief on behalf of itself, the Wyoming Farm Bureau Federation, the Montana Farm Bureau Federation, the Utah Farm Bureau Federation, and the New Mexico Farm & Livestock Bureau in support of Petitioners. Pursuant to Supreme Court Rule 37(3)(a) this *amici curiae* brief is filed with the written consent of all the parties.[1]

IDENTITY AND INTEREST OF *AMICI CURIAE*

Mountain States Legal Foundation ("MSLF") is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited government, and the free enterprise system. MSLF's members include individuals and businesses from every state in the Union. Over one

[1] Copies of the consent letters have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37(6), *amici* represent that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amici* and their members, made a monetary contribution for the preparation or submission of this brief.

thousand of MSLF's members own property in Wyoming, Montana, Utah, and New Mexico.

Wyoming Farm Bureau Federation, Montana Farm Bureau Federation, Utah Farm Bureau Federation, and New Mexico Farm & Livestock Bureau ("Farm Bureaus") are voluntary, non-profit, general farm and ranch organizations incorporated under the laws of their respective States. The Farm Bureaus represent the economic, educational, environmental, and social interests of over 50,000 member families.

Under the Coal Lands Acts of 1909 and 1910, 30 U.S.C. §§ 81, 83-85, Congress reserved the "coal" to the United States and granted the surface and all the other minerals (including oil and gas) to the patentees. Many of *amici's* members own patented lands from which the coal was reserved to the United States pursuant to the 1909 and 1910 Acts. Significant amounts of these lands are located in areas that have huge potential for the production of natural gas from coalbeds, *e.g.*, the Powder River Basin in Wyoming and Montana, the Green River Basin in Wyoming, the Uinta Basin in Utah, and the San Juan and Raton Basins in New Mexico.

The U.S. Department of the Interior has long recognized that, under the 1909 and 1910 Acts, the United States reserved only the solid rock "coal." *Ownership of and Right to Extract Coalbed Gas in Federal Coal Deposits* (M-36935), 88 Interior Dec. 538 (1981). Based upon this interpretation, many of *amici's* members granted the right to oil and gas companies to explore for and produce the natural gas from coalbeds beneath their lands in return for the payment of royalties.

In a 6 to 3 *en banc* decision, the United States Court of Appeals for the Tenth Circuit ruled that the word "coal" in the 1909 and 1910 Acts was "ambiguous." *Southern Ute Indian Tribe v. Amoco Production Co.*, 151 F.3d 1251, 1257 (10th Cir. 1998). Based upon this purported ambiguity, the Tenth Circuit held that under the 1909 and 1910 Acts the United States reserved the solid rock "coal" and natural gas that is "adsorbed" on the coal. *Id.* at 1267. This decision has disrupted the settled expectations of *amici's* members who have leased their natural gas estate. Under the Tenth Circuit's decision, these members may no longer be able to receive the royalty payments that are a necessary supplement to the income these members earn from their farming and ranching operations that help feed this Nation. These members may also be subject to claims of conversion, trespass, and/or breach of warranty of title. Other members who own lands that are yet unleased, but which contain significant reserves of natural gas in the coalbeds, may never develop their reserves and reap the benefit therefrom because of the Tenth Circuit's decision. Because *amici* and their members have a significant interest in the issue in this case, they respectfully submit this brief in support of Petitioners.

SUMMARY OF ARGUMENT

This Honorable Court should reverse the Tenth Circuit's decision for three reasons. First, the plain meaning of the word "coal" in the 1909 and 1910 Acts proves that Congress reserved only the solid rock "coal." Second, it is axiomatic that coal and natural gas are two separate minerals. The fact that some natural gas is adsorbed on

the coal does not change the natural gas into coal. And, it certainly does not justify the Tenth Circuit's creation of an unworkable split natural gas estate. Finally, the common law has always allowed the owners of split mineral estates to extract their individual minerals, notwithstanding the fact that the two minerals may be closely associated, and notwithstanding the fact that one mineral estate owner may damage the mineral estate of another.

ARGUMENT

I. THE PLAIN MEANING OF THE WORD "COAL" PROVES THAT CONGRESS RESERVED ONLY THE SOLID ROCK "COAL."

The issue in this case involves a simple question of statutory interpretation: does the reservation of "coal" in the 1909 and 1910 Acts include the natural gas found in coalbeds? In interpreting a statute a court must give effect to the intent of Congress. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982). The controlling intent is the intent of the Congress that passed the particular statute being interpreted. *Leo Sheep Co. v. United States*, 440 U.S. 668, 681 ("[t]he pertinent inquiry in this case is the intent of Congress when it granted land to the Union Pacific [Railroad] in 1862"). The first place to look for that intent is the language of the statute itself. *United States v. Denver & Rio Grande Ry. Co.*, 150 U.S. 1, 10-12 (1893). When looking at the language of the statute, a court must "assume" that congressional intent is reflected by the ordinary meaning of the words used. *United States v.*

Labonte, 117 S.Ct. 1673, 1677 (1997) (*citing Moskal v. United States*, 498 U.S. 103, 108 (1990)); *Russello v. United States*, 464 U.S. 16, 21 (1983).

Applying these well-established principles of statutory construction to the issue in this case reveals that when Congress passed the 1909 and 1910 Acts it reserved only the solid rock "coal." Throughout this Nation's history, the word "coal" has meant the solid rock. *Southern Ute Indian Tribe v. Amoco Production Co.*, 874 F.Supp. 1142, 1154 (D. Colo. 1995). This meaning is in accordance with the definitions of the word "coal" found in the dictionaries and reference works of the early 1900s. *Southern Ute Indian Tribe*, 151 F.3d at 1268 (10th Cir.) (Tacha, J., dissenting).

Although every schoolchild would agree that the word "coal" means the solid rock, the Tenth Circuit presumed that the word was "ambiguous" because neither the 1909 Act nor the 1910 Act defined the word. *Southern Ute Indian Tribe*, 151 F.3d at 1258 ("the Acts neither define coal nor mention [coalbed methane]; thus, the statutes do not by their plain language indicate congressional intent regarding [coalbed methane]"). The Tenth Circuit then placed the burden on Amoco to prove that the word was unambiguous. *Southern Ute Indian Tribe*, 151 F.3d at 1257 ("[t]he burden remains on defendants to dispel any ambiguity").

However, the fact that Congress did not define "coal" in the 1909 and 1910 Acts does not mean that the word is ambiguous. *Southern Ute Indian Tribe*, 151 F.3d at 1270 (Tacha, J., dissenting) ("[s]ilence does not equate with

ambiguity"). If that was true, every undefined word in a statute would be ambiguous. Such a result would make statutory interpretation impossible. That is why undefined words in a statute are to be construed in accordance with their plain meanings. *United States v. Smith*, 508 U.S. 223, 228 (1993) (*citing Perrin v. United States*, 444 U.S. 37, 44 (1979)). Thus, based upon the plain meaning of the word "coal" and simple common sense, Congress reserved only the solid rock "coal" from the lands patented under the 1909 and 1910 Acts.

II. THE TENTH CIRCUIT'S "SCIENTIFIC" ANALYSIS CREATED AN UNWORKABLE SPLIT NATURAL GAS ESTATE.

Based upon its belief that the word "coal" was ambiguous, the Tenth Circuit ventured into the world of colloidal science to justify its conclusion that Congress intended to reserve something more than just the solid rock "coal." Not only was the Tenth Circuit's "scientific" analysis wrong, it shows how desperate the Tenth Circuit was to reach what it believed to be the "right" result in this case.

The Tenth Circuit suggested that Congress in 1909 "may" have considered the natural gas found in coalbeds to be part of the solid rock coal.[2] *Southern Ute Indian Tribe*, 151 F.3d at 1260 ("Congress in 1909 *may have considered* [coalbed methane] to be part of that solid coal")

[2] There is no evidence that Congress in 1909 actually considered the natural gas in coalbeds to be part of the solid rock coal.

(emphasis added). The majority based this conclusion on the fact that some of the natural gas in the coalbeds is physically adsorbed on the surface of the coal. *Southern Ute Indian Tribe*, 151 F.3d at 1260-1261. Accordingly, the Tenth Circuit held that the "coal reserved to the United States in the 1909 and 1910 Acts includes the adsorbed [coalbed methane]." *Id.* at 1267.

However, the fact that the some of the natural gas in coalbeds gas is physically adsorbed on the coal does not change that natural gas into the solid rock coal. Physical adsorption occurs between all gases and solids.[3] Popiel, *Introduction to Colloid Science*, 67 (1978). Physical adsorption is caused by van der Waals forces that attract the natural gas molecules to the surface of the coal. *Id.* at 4-6, 66-68. These van der Waals forces are so weak that the natural gas is removed from the coal by a simple reduction in pressure. *Id.* at 68. More importantly, the physical adsorption/desorption process does not chemically alter either the natural gas or the coal.[4] *Id.* at 68. Thus, despite the effects of physical adsorption, natural gas and the coal remain two separate minerals.

[3] Thus, natural gas is also physically adsorbed on other reservoir rocks, such as sandstone, shale, and limestone. Yet, no one considers natural gas to be a part of those rocks.

[4] This important characterization of physical adsorption differentiates it from chemical adsorption. *Id.* at 66-69. When a gas is chemically adsorbed to a solid, strong chemical bonds are formed between the gas and the solid. *Id.* The application of a large amount of energy is required to break these chemical bonds. *Id.* Consequently, the gas and the solid are chemically altered during the chemical adsorption/desorption process. *Id.*

The Tenth Circuit's "scientific" analysis also ignored the fact that a significant portion of the natural gas migrates away from the coalbed over time and becomes trapped in other reservoir rocks.[5] Under the Tenth Circuit's decision, this natural gas belongs to the surface owner because it is not adsorbed on the coal. Thus, the Tenth Circuit created a split natural gas estate, *i.e.*, the ownership of natural gas now depends on the location of the natural gas. However, the ownership of natural gas (a fugacious mineral) has never been determined by its location, as has the ownership of solid minerals such as coal. *Brown v. Spilman*, 155 U.S. 665, 669-670 (1895). Instead, under the rule of capture, a person owns all the gas that is produced from his well, even if that gas originated underneath his neighbor's land. *Ohio Oil Co. v. Indiana*, 177 U.S. 190, 202-204 (1900). Congress did not intend to redefine the ownership of natural gas so as to create an unworkable split natural gas estate when it reserved "coal" under the 1909 and 1910 Acts.[6]

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[5] The Tenth Circuit expressly refused to address this natural gas. *Southern Ute Indian Tribe*, 1515 F.3d at 1260, n.8. As Judge Tacha pointed out in dissent, the majority ignored this natural gas because it would have put the majority in the awkward position of saying that the natural gas adsorbed on the coal is "coal" but the natural gas that migrated away is not "coal," even though both natural gases came from the same source rock and are chemically identical. *Southern Ute Indian Tribe*, 151 F.3d at 1270 (Tacha, J., dissenting).

[6] That this split natural gas estate is unworkable is further evidenced by the fact that natural gas not only is adsorbed on the coal but also exists as "free gas" in the cracks and fractures within the coal. Rice, Law, and Clayton, *Coalbed Gas – An Undeveloped Resource, in The Future of Energy Gases*, 389, 395 (U.S.G.S. Prof. Paper 1570, David G. Howell ed. 1993). Because

III. THE TENTH CIRCUIT IGNORED WELL-ESTABLISHED PRINCIPLES REGARDING THE OWNERSHIP OF, AND THE RIGHT TO EXTRACT, MINERALS.

The Tenth Circuit concluded that adsorbed natural gas is so "intimately associated" with the coal that Congress in 1909 could certainly have considered it to be part of the solid rock. *Southern Ute Indian Tribe*, 151 F.3d at 1261. However, the common law has always recognized that associated minerals could be separately owned and separately mined. *See e.g., Guffey v. Stroud*, 16 S.W.2d 527 (Tex. Comm'n App. 1929) (separate ownership of oil and natural gas). More importantly, in passing the Uraniferous Lignite Act, 30 U.S.C. §§ 541-541i, Congress expressly acknowledged that the patentees under the 1909 and 1910 Acts were granted all the minerals except coal, including those minerals found in the coalbeds. 30 U.S.C. § 541d (recognizing that patentees owned uranium found in lignite reserved under 1909 and 1910 Acts); H.R. Rep. No. 1478, 84th Cong., 1st Sess. 4 (1955), *reprinted in*, 1955 U.S.C.C.A.N. 2992, 2996 (patentees own "fee simple title to all minerals in the land, including valuable source materials, regardless of the host material or the mode of occurrence"). Thus, the fact that the adsorbed natural gas may be "associated" with the solid rock coal does not

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the Tenth Circuit held that Congress reserved only the natural gas that was adsorbed on the coal, 151 F.3d at 1267, the surface owner would own the "free gas" in the coal. Congress did not intend such an absurd result.

alter the individual identity of either mineral or mean that the owner of the coal owns the natural gas.

In one final desperate attempt to justify its decision, the Tenth Circuit concluded that the adsorbed natural gas must belong to the coal owner because in 1909 that natural gas could not be extracted without "damaging or destroying" the coal. *Southern Ute Indian Tribe*, 151 F.3d at 1261. The Tenth Circuit based this conclusion on its belief that in 1909 the only way to extract the natural gas was to mine the coal and then destroy it by subjecting it to very high temperatures in a laboratory.[7] *Id.* at 1260-1261. This is not true. Natural gas was first piped from coalbeds and used for heating purposes in 1746. Craig and Myers, *Ownership of Methane Gas in Coalbeds*, 24 Rocky Mtn. Min. L. Inst. 767, 768 (1978) (*citing* United States Bureau of Mines, Information Circular No. 7670, *Drainage and Utilization of Firedamp*, 1 (1953)).

More importantly, the removal of the natural gas from the coal does not damage the coal. Granted, the coalbed has to be penetrated in order to remove the natural gas, but the coal retains all of its economic value and all of its uses after the natural gas is removed.[8]

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[7] This process, "destructive distillation," produces gaseous elements through the destruction of the chemical bonds that held those elements together as a solid. The gas produced by "destructive distillation," commonly referred to as "coal-gas," is not at issue here.

[8] This is especially true considering that the coalbeds having the most economic potential for natural gas production are too deeply buried to be mined economically. *See*, Craig and Myers, at 768 ("coal found close to the surface . . . contains little or no gas").

Southern Ute Indian Tribe, 151 F.3d at 1270 (Tacha, J., dissenting). Even if the coal is damaged during the removal of the natural gas, that fact has no bearing on the question of who owns the natural gas. Under the common law, the owners of different mineral estates underlying the same land enjoy a reciprocal relationship regarding their mutual and simultaneous ability to extract their minerals. *Chartiers Block Coal Co. v. Mellon*, 25 A. 597 (Pa. 1893); 2 *Lindley On Mines*, §§ 812, 827 (2d ed. 1903); 6 *Thompson on Real Property*, § 48.20 (David A. Thomas ed. 1994). Thus, the owner of one mineral estate may use the mineral estate of another to exploit his estate and, in turn, must accord the other owner the same consideration, notwithstanding the absence of patent or deed language authorizing such use. 6 *American Law of Mining*, § 200.04[1] (2d ed. 1997). If one owner's use of the mineral estate of another is unreasonable, then the former owner is liable to the latter owner for damages. 6 *American Law of Mining*, § 200.04[1][c].

The law of split mineral estates was well established when Congress passed the 1909 Act and, thereby, created the first split mineral estate on public lands. 2 *Lindley on Mines*, §§ 9, 812; *Del Monte Mining & Milling Co. v. Last Chance Mining and Milling Co.*, 171 U.S. 55, 60-61 (1898). Because Congress did not write the 1909 Act "upon a clean slate," *United States v. Texas*, 507 U.S. 529, 534 (1993), it must be presumed that Congress intended for the common law of split mineral estates to apply to the split mineral estates created by the 1909 and 1910 Acts.[9]

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[9] The common law of split mineral estates is analogous to the common law with respect to split surface and mineral

Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952) ("[s]tatutes which invade the common law . . . are to be read with the presumption of favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident"). Thus, the fact that the coal may be damaged during the removal of the natural gas does not mean the coal owner owns the natural gas.

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estates. 2 *Lindley On Mines*, § 812. Congress adopted the common law regarding split surface and mineral estates. *See, Kinney-Coastal Oil Company v. Kieffer*, 277 U.S. 488 (1928). Thus, it is reasonable to conclude that Congress also adopted the common law regarding split mineral estates.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reverse the decision of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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